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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

FLAVIO CARRASCO et al., Plaintiffs and Appellants, v. HSBC BANK USA, N.A. et al., Defendants and Respondents.	H039841 (Santa Clara County Super. Ct. No. 1-12-CV221425)

I. INTRODUCTION

Appellants Flavio Carrasco and Erasmo Carrasco (hereafter plaintiffs) obtained a home loan in the amount of $460,000. After they defaulted on the loan, nonjudicial foreclosure proceedings were initiated and their home was sold at a trustee's sale.

Plaintiffs filed the instant action against HSBC Bank USA, N.A. as trustee for the certificate-holders of Deutsche Alt-A Securities Mortgage Loan Trust, Series 2007-AR2 Mortgage Pass-Through Certificates, Recontrust Company, and MERS, (hereafter defendants) seeking money damages and declaratory and injunctive relief. The trial court sustained defendants' demurrers to all 12 causes of action asserted in the first amended complaint without leave to amend and entered a judgment of dismissal.

For the reasons stated below, we conclude that the trial court did not err in sustaining the demurrers to all 12 causes of action and that appellants have not shown on

appeal that the first amended complaint may be further amended to state a cause of action. We will therefore affirm the judgment of dismissal.

II. FACTUAL BACKGROUND

Our summary of the facts is drawn from the allegations of the first amended complaint and the parties' requests for judicial notice, since in reviewing a ruling sustaining a demurrer without leave to amend we assume the truth of the properly pleaded factual allegations and the matters properly subject to judicial notice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311(*Blank*), 318; *Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 200.)

Plaintiffs describe themselves as "blind, elderly and diabetic." They had owned their home in San Jose for more than 35 years. In 2006 plaintiffs borrowed $460,000 from Transnational Financial Network Inc. The loan was secured by a deed of trust on their home. The 2006 deed of trust states that the trustee is First American Title and the beneficiary is Mortgage Electronic Registration Systems, Inc. (MERS).

According to plaintiffs, they suffered hardship during the "Real Estate Rescission" because they are "older," are "of Spanish/Mexican" descent, and "house disabled persons." Plaintiffs also suffered a decline in income from their construction business. Their request for a modification of their home loan was refused by Countrywide.[1]

Plaintiffs assert that they made payments on the promissory note for the home loan for which there was not a proper accounting. On May 7, 2010, a notice of default and election to sell under the deed of trust was recorded by Recontrust Company. The notice of default states that the amount of past due mortgage loan payments totaled $48,232.94 as of May 6, 2010. Plaintiffs deny receiving the notice of default. They do not deny that they were in default on their loan.

[1] The record on appeal does not indicate that Countrywide is a party to this action.

On May 19, 2010, a substitution of trustee and assignment of deed of trust was recorded in which MERS assigned all beneficial interest in the deed of trust to HSBC Bank. A notice of trustee's sale of plaintiffs' property was recorded on August 16, 2010. Plaintiffs deny receiving a notice of trustee's sale.

The trustee's deed upon sale that was recorded on September 20, 2010, states that plaintiff's property was sold to HSBC Bank on September 7, 2010. At the time of sale, the total amount of the unpaid debt was $525,006.64. Plaintiffs allege that they did not understand what was happening and did not know that their home had been sold by the trustee. They subsequently received a summons and complaint for unlawful detainer.

III. PROCEDURAL BACKGROUND

Plaintiffs filed their original verified complaint in March 2012. Defendants demurred to the complaint and on December 21, 2012, the trial court entered its order sustaining the demurrers to each cause of action with leave to amend. Thereafter, plaintiffs filed their first amended complaint.

The 12 causes of action asserted in the first amended complaint include (1) declaratory relief, (2) elder abuse, (3) wrongful foreclosure, violation of Civil Code section 2924 et seq.,[2] (4) slander of title, (5) violation of the Consumer Legal Remedies Act (§ 1750 et seq.), (6) preliminary and permanent injunction, (7) negligence, (8) breach of contract, (9) misrepresentation and fraud, (10) promissory estoppel, (11) violation of Business and Professions Code section 17200; and (12) accounting.

The trial court's March 27, 2013 order sustained defendants' demurrers to all 12 causes of action in the first amended complaint without leave to amend. The order states that after granting defendant's request for judicial notice, the trial court found that each cause of action failed to state a claim. A judgment of dismissal was entered on

[2] All further statutory references are to the Civil Code unless otherwise indicated.

April 25, 2013. Plaintiffs filed a motion for reconsideration and request for rescission of the judgment of dismissal, which the trial court denied in its July 5, 2013 order.

Thereafter, plaintiffs filed a notice of appeal from the "1) Order re: demurrer to plaintiff's first amended complaint; notice of entry of judgment mailed April 30, 2013 [¶] 2) Motion for reconsideration of dismissal without leave to amend heard June 13, 2013." We will exercise our discretion to deem this appeal to have been taken from the judgment of dismissal and the order denying plaintiff's motion for reconsideration. (See *First Aid Services of San Diego, Inc. v. California Employment Development Dept.* (2005) 133 Cal.App.4th 1470, 1474, fn. 1; *Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 782, fn. 4.)

However, we determine that plaintiffs have abandoned their appeal of the order denying their motion for reconsideration since they failed to include in their briefing any argument pertaining to the merits of the order. (See *In re Sade C.* (1996) 13 Cal.4th 952, 994.) We will therefore give no further consideration to plaintiffs' appeal from the order denying their motion for reconsideration.

IV. DISCUSSION

A. *Standard of Review*

The standard of review is well established. On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, our review is de novo. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) In performing our independent review of the complaint, we assume the truth of all facts properly pleaded by the plaintiff. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6 (*Evans*).) "We also accept as true all facts that may be implied or reasonably inferred from those expressly alleged. [Citation.]" (*Rotolo v. San Jose Sports & Entertainment, LLC* (2007) 151 Cal.App.4th 307, 320-321, disapproved on another ground in *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 334.) Further, "we give the complaint a reasonable interpretation, and read it in context." (*Schifando v. City of Los*

Angeles (2003) 31 Cal.4th 1074, 1081 (*Schifando*).) But we do not assume the truth of " ' "contentions, deductions or conclusions of fact or law." ' " (*Evans, supra*, at p. 6.)

We also consider matters that may be judicially noticed and facts appearing in any exhibits attached to the complaint. (Code Civ. Proc., § 430.30, subd. (a); *Schifando, supra,* 31 Cal.4th at p. 1081; *Blank, supra,* 39 Cal.3d at p. 318; *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 225, fn. 1.) After reviewing the allegations of the complaint, the complaint's exhibits, and the matters properly subject to judicial notice, we exercise our independent judgment as to whether the complaint states a cause of action as a matter of law. (See *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

We will apply this standard of review to each cause of action asserted in the first amended complaint to determine whether the trial court properly sustained defendants' demurrers.

B. *Declaratory Relief*

In their first cause of action for declaratory relief, plaintiffs allege that defendants wrongfully foreclosed on their home because defendants failed to serve statutorily required notices, alleged an incorrect amount due, did not answer requests for an accounting, committed elder abuse, failed to properly record notices, failed to comply with sections 2923.5 and 2924 et seq., and because plaintiffs tendered the amount due pursuant to the rejected loan modification.

Plaintiffs argue that they have sufficiently alleged a cause of action for declaratory relief because (1) they seek a declaration of rights or duties with respect to property; and (2) there is an actual controversy regarding a justiciable question of defendant's compliance with section 2923.5.[3]

[3] In 2010, when defendants allegedly recorded a notice of default followed by a notice of sale of plaintiffs' residence, former section 2923.5, subdivision (a)(1) (continued)

"Code of Civil Procedure section 1060 authorizes '[a]ny person . . . who desires a declaration of his or her rights or duties with respect to another . . . in cases of *actual controversy relating to the legal rights and duties of the respective parties,* [to] bring an original action . . . for a declaration of his or her rights and duties . . . .' (Code Civ. Proc., § 1060, italics added.)" (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 513 (*Jenkins*); see also *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 909.)

Thus, "[t]he purpose of a judicial declaration of rights in advance of an actual tortious incident is to enable the parties to shape their conduct so as to avoid a breach." (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848.) Declaratory relief is therefore a remedy that " 'operates *prospectively*, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.' " (*Ibid.*, italics added.)

In the present case, plaintiffs allege that defendants wrongfully sold their home at a foreclosure sale. They therefore seek a remedy for a past wrong. In the absence of any factual allegations indicating that an actual, present controversy exists between the parties, plaintiffs have failed to state a cause of action for declaratory relief. (See *Jenkins, supra*, 216 Cal.App.4th at pp. 513-514.)

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provided in part: "A mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to Section 2924 until 30 days after initial contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (g)." Subdivision (g) of former section 2923.5 provided: "A notice of default may be filed pursuant to Section 2924 when a mortgagee, beneficiary, or authorized agent has not contacted a borrower as required by paragraph (2) of subdivision (a) provided that the failure to contact the borrower occurred despite the due diligence of the mortgagee, beneficiary, or authorized agent."

Plaintiffs' reliance on the decision in *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047 (*Intengan)* does not persuade us otherwise. In *Intengan*, the appellate court ruled that the plaintiff homeowner could state a cause of action for wrongful foreclosure (not declaratory relief) based on allegations that defendants had violated section 2923.5. (*Id*. at p. 1059.) The *Intengan* decision is also factually distinguishable, since the plaintiff in that case did not allege that a foreclosure sale of the plaintiff's property had taken place. Moreover, the appellate court stated that the only relief available for a violation of section 2923.5 was a postponement of the foreclosure sale. (*Ibid*.) Here, plaintiffs allege that the foreclosure sale took place several years ago; therefore, the remedy of a postponement of the foreclosure sale is not available to them.

For these reasons, we determine that the trial court properly sustained the demurrer to the cause of action for declaratory relief.

C. *Elder Abuse*

In the second cause of action for elder abuse, plaintiffs allege that they are "elder and dependent adults" who speak "little or no English," and that defendants wrongfully took title to their home with intent to defraud. Plaintiffs further allege that they had always paid their mortgage payments until defendants used their superior position to take advantage of plaintiffs by putting them in a new loan "which they could not understand."

The elements of a cause of action for financial elder abuse are statutory. Welfare and Institutions Code section 15610.30, subdivision (a) provides: " 'Financial abuse' of an elder or dependent adult occurs when a person or entity does any of the following: [¶] (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. [¶] (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. [¶] (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting,

appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 1575 of the Civil Code."

Absent an allegation of intent to defraud or undue influence, a plaintiff must allege at least a " 'wrongful use' " of property. (Welf. & Inst. Code, § 15610.30, subd. (a)(1); *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 527-528 (*Stebley*).) "Wrongful use" is defined in the statute as follows: "A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." (Welf. & Inst. Code, §15610.30, subd. (b).)

However, the general rule is that "[i]t is simply not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid. [Citations.]" (*Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal.App.3d 318, 334.) Thus, a cause of action for financial elder abuse is not stated where the plaintiff homeowner merely alleges that the defendant's foreclosure caused her to move out of her home. (*Stebley, supra*, 202 Cal.App.4th at p. 527.)

Plaintiffs' cause of action for elder abuse similarly fails to state sufficient facts for a claim of financial elder abuse under Welfare and Institutions Code section 15610.30. The allegations of their first amended complaint and the matters properly subject to judicial notice make clear that defendants foreclosed on plaintiff's home because plaintiffs defaulted on their loan. Plaintiffs' conclusory allegation that Defendants obtained title to plaintiffs' real property for a wrongful use is insufficient because we do not assume the truth of " ' "contentions, deductions or conclusions of fact or law." ' " (*Evans, supra*, 38 Cal.4th at p. 6.)

The conclusory allegation that defendants obtained title to plaintiffs' home with intent to defraud is also insufficient to state a cause of action for financial elder abuse.

"In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 (*Lazar*).) We also observe that the first amended complaint does not allege that defendants obtained plaintiffs' property by undue influence.

Since plaintiffs have failed to state facts sufficient for a cause of action for financial elder abuse under Welfare and Institutions Code section 15610.30, we determine that the trial court properly sustained the demurrer to the cause of action for elder abuse.

D. *Wrongful Foreclosure*

In the third cause of action for wrongful foreclosure, plaintiffs allege that defendants wrongfully foreclosed on their home because defendants filed notices of default without authority; failed to serve notices of default in violation of section 2924 et seq.; failed to serve plaintiffs with a notice of trustee's sale in violation of section 2924 et seq.; alleged an incorrect amount due; breached the loan modification contract; did not comply with section 2923.5; regained ownership of the property by unfair or deceptive acts or practices; used unfair business practices; took plaintiffs' home without their consent; did not comply with section 2924 et seq.; misapplied payments and charged improper charges; and wrongfully recorded a deed of trust. Plaintiffs also allege that the foreclosure was wrongful because defendants were not the beneficiary and plaintiffs' tender of the amount due under the loan modification was rejected.

According to plaintiffs, they have sufficiently alleged a cause of action for wrongful foreclosure based on defendants' failure to comply with California law governing nonjudicial foreclosure and defendants' lack of authority to foreclose. Alternatively, they state that they could amend the complaint to state many more (although unspecified) reasons that the foreclosure of their home was wrongful.

The elements of a cause of action for wrongful foreclosure are well established. "To obtain the equitable set-aside of a trustee's sale or maintain a wrongful foreclosure claim, a plaintiff must allege that (1) defendants caused an illegal, fraudulent, or willfully oppressive sale of the property pursuant to a power of sale in a mortgage or deed of trust; (2) the plaintiff suffered prejudice or harm; and (3) the plaintiff tendered the amount of the secured indebtedness or was excused from tendering. [Citation.]" (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062 (*Chavez*).)

Thus, "a plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests. [Citations.]" (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 272 (*Fontenot*).) " 'Prejudice is not presumed from "mere irregularities" in the process. [Citation.]' " (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1507-1508; see also *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 443 (*Debrunner*) [following *Fontenot*].)

Having reviewed the first amended complaint, we find that plaintiffs have failed to allege that they were prejudiced by the alleged procedural defects in the foreclosure process or defendants' alleged lack of authority to foreclose. Plaintiffs have not alleged that as a result of the procedural defects or defendants' lack of authority their "ability to contest or avert foreclosure was impaired." (*Debrunner, supra*, 204 Cal.App.4th at p. 444.) Since the element of prejudice was not sufficiently alleged, the trial court did not err in sustaining the demurrer to the cause of action for wrongful foreclosure.

E. *Slander of Title*

In the fourth cause of action for slander of title, plaintiffs allege that defendants have published false statements because the notice of default, notice of trustee's sale, and trustee's deed upon sale did not comply with section 2923.5.

Plaintiffs argue that these allegations are sufficient to state a cause of action for slander of title. They also argue that publication of the notices constituted slander of title because the notices caused the loss of their home and the publication was not privileged.

"Slander or disparagement of title occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes the owner thereof ' "some special pecuniary loss or damage." ' [Citation.] The elements of the tort are (1) a publication, (2) without privilege or justification, (3) falsity, and (4) direct pecuniary loss. [Citations.] If the publication is reasonably understood to cast doubt upon the existence or extent of another's interest in land, it is disparaging to the latter's title. [Citation.]" (*Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1030.)

Pursuant to section 2924, subdivision (d)(1), the publication of the notices required as part of the nonjudicial foreclosure process is a publication that is protected by the qualified privilege set forth in section 47, subdivision (c)(1).[4] (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 335-336 (*Kachlon*) [construing former section 2924, subdivision (d)].) To overcome the qualified privilege, the plaintiff must also allege malice. In this context, "malice is defined as actual malice, meaning ' "that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights." ' [Citations.]" (*Kachlon*, *supra*, at p. 336.)

Although plaintiffs allege that defendants' publication of the notices in the foreclosure process was not privileged because "[d]efendants committed such acts

[4] Section 47, subdivision (c)(1) provides: "A privileged publication or broadcast is one made: [¶] . . . [¶] In a communication, without malice, to a person interested therein, (1) by one who is also interested."

knowingly and with intent to cause harm and/or with reckless disregard for the truth," those conclusory allegations are insufficient to overcome the qualified privilege. " '[W]here the complaint discloses a case of qualified privilege, no malice is presumed and in order to state a cause of action the pleading must contain affirmative allegations of *malice in fact*.' [Citation.] This is because 'the very privilege creates a presumption that the communication is used innocently and without malice. [Citations.]' [Citation.]" (*Lesperance v. North American Aviation, Inc.* (1963) 217 Cal.App.2d 336, 341, fn. omitted.)

In the absence of any factual allegations regarding malice, we determine that the trial court properly sustained the demurrer to the cause of action for slander of title.

F. *Violation of Consumer Legal Remedies Act*

In the fifth cause of action for violation of the Consumer Legal Remedies Act (§ 1750 et seq.) plaintiffs allege that defendants' act of wrongfully foreclosing constitutes an unfair and deceptive practice involving "the purchase and sale of personal property in the form of a Promissory Note secured by a Deed of Trust on real property, which was the sale of goods and services." According to plaintiffs, these allegations are sufficient to state a cause of action for violation of the Consumer Legal Remedies Act. We disagree.

"The Consumers Legal Remedies Act (CLRA) proscribes specified 'unfair methods of competition and unfair or deceptive acts or practices' in transactions for the sale or lease of goods [or services] to consumers. (. . . § 1770, subd. (a).)" (*Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 833.)

"Goods" are defined in the CLRA as "tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property, whether or not they are severable from the real property." (§ 1761, subd. (a).) " 'Services' means work, labor, and services for other than a commercial or business use,

including services furnished in connection with the sale or repair of goods." (§ 1761, subd. (b).)

Since the CLRA expressly applies to transactions for the sale or lease of goods or services, the CLRA does not apply to transactions involving the sale of real property. (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1488.) Plaintiffs have not provided any authority to support their contention that the CLRA applies to a transaction involving a promissory note. We therefore find that the allegations in the first amended complaint are insufficient to state a cause of action for violation of the CLRA.

G. *Preliminary and Permanent Injunction*

In the sixth cause of action for preliminary and permanent injunction plaintiffs seek an injunction prohibiting defendants from transferring their home and rescission of the trustee's deed of sale, based on their allegations that defendants have wrongfully foreclosed and are threatening to evict them.

Plaintiffs contend that these allegations are sufficient because the loss of their home constitutes irreparable harm and injunctive relief is necessary to preserve the status quo by enjoining nonjudicial foreclosure and eviction proceedings.

We determine that plaintiffs cannot state a cause of action for injunctive relief. "Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted. [Citation.]" (*Shell Oil Co. v. Richter* (1942) 52 Cal.App.2d 164, 168 (*Shell Oil*); see also *County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 973 [a permanent injunction is attendant to an underlying cause of action].)

As we have discussed with regard to the causes of action for declaratory relief, elder abuse, wrongful foreclosure, slander of title, and violation of the CLRA, and as we will discuss with regard to the remaining causes of action in the first amended complaint, we determine that plaintiffs have not stated any viable causes of action and the demurrers

were properly sustained. For that reason, injunctive relief may not be granted. (See *Shell Oil*, *supra*, 52 Cal.App.2d at p. 168.)

Accordingly, we determine that the trial court properly sustained the demurrer to the cause of action for preliminary and permanent injunction.

H. *Negligence*

In the seventh cause of action for negligence, plaintiffs allege that defendants had a duty of care to them "as lenders, trustees or foreclosure agents who had a duty to use reasonable care to complete their job as laid out by California Statute and their employer." Plaintiffs further allege that defendants breached their duty of care because they "did not follow [section] 2923.5 and contact Plaintiff, thereafter also making the Notice of Default and balance of [section] 2924 improper." Plaintiffs argue that these allegations are sufficient to state a cause of action for negligence because they allege that defendants breached their "ordinary duty of reasonable care as a lender."

"To state a cause of action for negligence, a plaintiff must allege (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries. [Citation.] Whether a duty of care exists is a question of law to be determined on a case-by-case basis. [Citation.]" (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 62 (*Lueras*).)

In the banking context, it is well established that "[l]enders and borrowers operate at arm's length. [Citations.] '[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.' [Citation.]" (*Lueras*, *supra*, 221 Cal.App.4th at p. 63.) Thus, " '[l]iability to a borrower for negligence arises only when the lender "actively participates" in the financed enterprise "beyond the domain of the usual money lender." ' [Citations.]" (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096; but see *Lueras*, *supra*, at p. 63 [lender owes a duty to borrower to not make material misrepresentations about the status

of an application for a loan modification or about the date, time, or status of a foreclosure sale]; *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 948 [lender arguably owed the plaintiff a duty of care in processing the plaintiff's loan modification application].)

Here, plaintiffs allege that defendants breached their duty of care "as lenders, trustees or foreclosure agents who had a duty to use reasonable care to complete their job as laid out by California Statute and their employer." Plaintiffs further allege that "Defendants negligently and improperly recorded a Trustees Deed in violation of [section] 2924 et seq. and [section] 2934.5 et seq. and threatens [*sic*] to proceed to evict Plaintiffs from their home of thirty-five (35) years." Plaintiffs have not alleged any facts to show that defendants' conduct fell outside their role as " 'a mere lender of money' " such that defendants owed a duty of care to plaintiffs. Absent sufficient allegations of a duty of care, plaintiffs' cause of action for negligence fails. (See *Lueras, supra*, 221 Cal.App.4th at p. 63.)

Accordingly, we determine that the trial court did not err in sustaining the demurrer to the cause of action for negligence.

I. *Breach of Contract*

In the eighth cause of action for breach of contract, plaintiffs allege that "[d]efendants breached the terms of the Note and Deed of Trust and breached the terms of the loan modification agreement which caused Plaintiffs to lose ownership of their home." Plaintiffs argue that they have also sufficiently pleaded breach of contract by alleging that defendants failed to give 30-days notice before filing the notice of default, as required by the terms of the deed of trust.

"To allege a cause of action for breach of contract, a plaintiff must allege, '(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.' [Citation.]" (*Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 921 (*Bushell*).)

As defendants correctly point out, plaintiffs have failed to allege that they performed under the deed of trust or that their performance was excused. Plaintiffs therefore fail to state facts sufficient for a cause of action for breach of contract based on a breach of the terms of the deed of trust. (See *Bushell*, *supra*, 220 Cal.App.4th at p. 921.)

Plaintiffs have also failed to state facts sufficient for a cause of action for breach of contract based on an alleged loan modification agreement. "If the action is based on alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference. [Citation.]" (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307.) Alternatively, " '[t]o state a cause of action for breach of contract, it is absolutely essential to plead the terms of the contract either in haec verba[5] or according to legal effect.' [Citation.]" (*Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 270, fn. 1.)

Here, plaintiffs have failed to either attach a copy of the alleged loan modification agreement to the complaint or plead the terms or legal effect of the alleged loan modification agreement. Plaintiffs have also pleaded inconsistently within the body of the first amended complaint that their request for a loan modification was refused. Therefore, plaintiffs have not alleged facts sufficient for a cause of action for breach of contract based upon an alleged loan modification agreement.

Plaintiffs also allege that defendants breached the covenant of good faith and fair dealing. However, "[t]he covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made.* [Citation.] The

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[5] The phrase "in haec verba" is Latin for "[i]n these words; in the same words." (See Black's Law Dict. (6th ed. 1990) p. 782, col. 1.)

covenant thus cannot ‘ “be endowed with an existence independent of its contractual underpinnings.” ’ [Citations.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 (*Guz*).) “The covenant also requires each party to do everything the contract presupposes the party will do to accomplish the agreement’s purposes. [Citations.]” (*Jenkins, supra,* 216 Cal.App.4th at p. 524.)

Since plaintiffs have failed to allege that they performed under the promissory note or deed of trust, or that their performance was excused, plaintiffs have failed to plead that as a party to the alleged contract they have done everything required to accomplish the purposes of the agreement. (See *Jenkins, supra,* 216 Cal.App.4th at p. 524.) They have therefore failed to state a cause of action for breach of the covenant of good faith and fair dealing based on the allegation that defendants breached the deed of trust. Moreover, a cause of action for breach of the covenant of good faith and fair dealing cannot be based upon a loan modification agreement that was not sufficiently alleged to exist. (See *Guz, supra,* 24 Cal.4th at pp. 349-350.)

Accordingly, we determine that the trial court did not err in sustaining the demurrer to the cause of action for breach of contract/breach of the covenant of good faith and fair dealing.

J. *Misrepresentation and Fraud*

In the ninth cause of action for misrepresentation and fraud, plaintiffs allege that defendants violated section 2923.5; failed in their explanation of the loan; misrepresented that plaintiffs “had a proper loan modification;” used their superior position and expertise to provide the elderly and limited English-speaking plaintiffs with “a bad new loan;” and misrepresented that they had the authority to collect payments, report to credit reporting agencies, and file notices of default. Plaintiffs further allege that defendants’

misrepresentations constitute constructive fraud. They argue on appeal that these allegations are sufficient to state causes of action for fraud and constructive fraud.

The California Supreme Court has established the requirements for pleading a fraud claim. "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] 'Thus " 'the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.' " [Citation.] [¶] This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered." ' [Citation.] A plaintiff's burden in asserting a fraud claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.' [Citation.]" (*Lazar*, *supra*, 12 Cal.4th at p. 645.)

Our review of plaintiffs' allegations of misrepresentation and fraud shows that the first amended complaint completely lacks the requisite factual allegations of " ' "how, when, where, to whom, and by what means the representations were tendered." ' [Citation.]" (*Lazar*, *supra*, 12 Cal.4th at p. 645.) The allegations in the first amended complaint are therefore insufficient to state a cause of action for fraud.

The allegations in the first amended complaint are also insufficient for a cause of action for constructive fraud. "Constructive fraud ' " ' "is a unique species of fraud applicable only to a fiduciary or confidential relationship." ' " ' [Citation.] 'Constructive fraud "arises on a breach of duty by one in a confidential or fiduciary relationship to another which induces justifiable reliance by the latter to his [or her] prejudice." [Citation.]' " (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1131.) However, "it is established that absent special circumstances . . . a loan transaction is at arm's length and there is no fiduciary relationship between the borrower

and lender. [Citations.]" (*Oaks Management Corporation v. Superior Court* (2006) 145 Cal.App.4th 453, 466.)

Plaintiffs have not alleged that they have a fiduciary or confidential relationship with defendants. They have therefore failed to state a cause of action for constructive fraud. Accordingly, we determine that the trial court properly sustained the demurrer to the cause of action for misrepresentation and fraud.

K. *Estoppel/Waiver*

In the tenth cause of action for "estoppel/waiver," plaintiffs allege that they relied to their detriment on defendants' "promises to modify the loan to reduce payments to $992.00 per month and to treat the loan as current and in full force and effect as modified." Plaintiffs further allege that defendants did not honor these promises and foreclosed on their home without notice, causing them to suffer the detriment of losing their home.

On appeal, plaintiffs argue that they have sufficiently stated a cause of action for promissory estoppel because they allege that defendants promised to modify their loan, plaintiffs relied on the promises, and plaintiffs suffered detriment due to their reliance on defendants' promise.

"Promissory estoppel is an equitable doctrine that allows enforcement of a promise that would otherwise be unenforceable based on lack of consideration." (*Chavez, supra,* 219 Cal.App.4th at p. 1063.) The elements of a promissory estoppel cause of action are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his [or her] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his [or her] reliance." (*Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 890.)

Defendants argue that plaintiffs have failed to adequately plead the elements of a cause of action for promissory estoppel. We agree.

"The party claiming estoppel must specifically plead all facts relied on to establish its elements. [Citations.] One essential element is detrimental reliance by the promisee. [Citation.]" (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 48 (*Smith*); see also *Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 948 [allegation of detrimental reliance fails for lack of specificity].) Thus, a conclusory allegation that the plaintiffs had relied on the defendant's promises is insufficient to state a cause of action for promissory estoppel. (*Smith*, *supra*, at p. 48.)

Here, the first amended complaint states in the cause of action for promissory estoppel that plaintiffs relied on defendants' promise to modify their loan; defendants foreclosed on their home without notice; and plaintiffs suffered the detriment of losing their home. The cause of action for promissory estoppel also incorporates the allegation in the body of the first amended complaint that, "Plaintiffs sought a modification and were refused by Countrywide." These conclusory and inconsistent allegations are insufficient to meet the requirement that detrimental reliance must be specifically pleaded. (See *Smith*, *supra*, 225 Cal.App.3d at p. 48.) Plaintiffs have therefore failed to state a cause of action for promissory estoppel.[6]

We therefore determine that the trial court did not err in sustaining the demurrer to the cause of action for promissory estoppel.

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[6] The trial court ruled that the cause of action for promissory estoppel was barred by the statute of frauds because an agreement to modify a loan comes within the statute of frauds and plaintiffs had failed to attach a written loan modification agreement to their complaint. We observe that it has been held that, "A party is estopped to assert the statute of frauds as a defense 'where [the] party, by words or conduct, represents that he [or she] will stand by his [or her] oral agreement, and the other party, in reliance upon that representation, changes his [or her] position, to his [or her] detriment.' [Citation.]" (*Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1041, fn. 10.)

L. *Violation of Business and Professions Code Section 17200 et seq.*

In the eleventh cause of action for violation of Business and Professions Code section 17200 et seq., plaintiffs allege that defendants acquired ownership of plaintiffs' home through unlawful, unfair or fraudulent business practices and unfair, untrue or misleading advertising. The improper practices alleged include defendants' use of their superior knowledge to take advantage of plaintiffs, defendants' failure to comply with section 2923.5, and defendants' wrongful filing of a notice of default.

Plaintiffs argue that these allegations are sufficient to state a cause of action for violation of Business and Professions Code section 17200 et seq. because they have alleged that defendants "used untrue and misleading information to ultimately own Plaintiffs home."

Under Business and Professions Code section 17200, there are "three different kinds of business acts or practices that may constitute unfair competition: the unlawful, the unfair, and the fraudulent. [Citations.]" (*Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390, 394.) "A claim made under [Business and Professions Code] section 17200 ' "is not confined to anticompetitive business practices, but is also directed toward the public's right to protection from fraud, deceit, and unlawful conduct. [Citation.] Thus, California courts have consistently interpreted the language of [Business and Professions Code] section 17200 broadly. " ' [Citations.]" (*Wilson v. Hynek* (2012) 207 Cal.App.4th 999, 1007.)

However, to bring a private action under Business and Professions Code section 17200 et seq. a party must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that the economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322; Bus. & Prof. Code, § 17204.) A cause of action under Business and Professions Code section 17200 et seq. "will survive a demurrer if the plaintiff can plead

‘ “general factual allegations of injury resulting from the defendant’s conduct.” ’ [Citation.]” (*Jenkins, supra,* 216 Cal.App.4th at p. 521; see also *Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1099 [causation prong of the standing test is not shown where “a complaining party would suffer the same harm whether or not a defendant complied with the law”].)

In *Jenkins*, the appellate court ruled that the complaint’s allegations showed that the plaintiff’s home was subject to nonjudicial foreclosure due to the plaintiff’s default on her loan, which occurred prior to the defendants’ alleged wrongful acts. The court determined that the plaintiff could not assert that her alleged economic injury of impending foreclosure was caused by the defendants’ wrongful actions, and therefore she could not satisfy the causation prong of the test for standing to bring a private action under Business and Professions Code section 17200 et seq. (*Jenkins, supra,* 216 Cal.App.4th at pp. 522-523; see also *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 614 (*Graham*) [no claim stated under Business and Professions Code section 17200 where nonjudicial foreclosure proceedings were the result of the plaintiff’s default, not the alleged conduct of defendants].)

In the present case, plaintiffs’ allegations in the first amended complaint similarly fail to allege the causation prong of the test for standing to bring a private action for unfair competition under Business and Professions Code section 17200 et seq. The allegations show that the economic loss allegedly suffered by plaintiffs—the loss of their home through nonjudicial foreclosure—was caused by plaintiffs’ default on their home loan, not on defendants’ alleged wrongful conduct. (See *Graham, supra,* 226 Cal.App.4th at p. 614.)

We therefore determine that the trial court properly sustained the demurrer to the cause of action for violation of Business and Professions Code section 17200 et seq.

M. *Accounting*

In the twelfth cause of action for an accounting, plaintiffs allege that they have tendered the full amount of principal and interest on their home loan as modified; defendants have not properly accounted for plaintiffs' payments; defendants "are constantly wrong with many mischarges," and an accounting is necessary to ascertain "what, if any is owed and to delete the wrongful charges." Plaintiffs argue that these allegations are sufficient for a cause of action for an accounting because an accounting or beneficiary statement must be provided on demand by the plaintiff, pursuant to section 2943.[7]

However, "[a] cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting. [Citations.]" (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179.) Here, plaintiffs have failed to allege that a balance is due to them from defendants.

We therefore find that the trial court did not err in sustaining the demurrer to the cause of action for an accounting

N. *Request for Leave to Amend*

On appeal, we understand plaintiffs to generally argue that any defects found in the allegations in the first amended complaint may be remedied by amendment, and therefore the trial court erred in sustaining the demurrers to each cause of action without leave to amend. Their argument on appeal is unconvincing.

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[7] Section 2943, subdivision (b)(1) provides: "A beneficiary, or his or her authorized agent, shall, within 21 days of the receipt of a written demand by an entitled person or his or her authorized agent, prepare and deliver to the person demanding it a true, correct, and complete copy of the note or other evidence of indebtedness with any modification thereto, and a beneficiary statement."

The rules governing leave to amend the complaint are well established. "If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]" (*Schifando, supra*, 31 Cal.4th at p. 1081.)

"To satisfy that burden on appeal, a plaintiff 'must show in what manner he [or she] can amend his [or her] complaint and how that amendment will change the legal effect of his [or her] pleading.' [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation]." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44 (*Rakestraw*).)

In their argument on appeal, plaintiffs have failed to set forth any factual allegations that sufficiently state all of the elements of any of their twelve causes of action. (See *Rakestraw, supra*, 81 Cal.App.4th at pp. 43-44.) We therefore conclude that plaintiffs have not met their burden on appeal to show that the first amended complaint may be further amended to state a cause of action and the trial court did not abuse its discretion in denying leave to amend.

V. DISPOSITION

The judgment of dismissal is affirmed. Each party to bear its own costs on appeal.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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GROVER, J.